UNION ALLOY (M) SDN. BHD.

v.

SYARIKAT PEMBENAAN YEOH TIONG LAY SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' DR. ZAKARIA M. YATIM J.
[CIVIL SUIT NO. C324 OF 1979]
25 MAY 1993

SALE OF GOODS: Contract of sale executed between plaintiff and defendant - Implied conditions of fitness for purpose and merchantability - Sections 15 & 16 Sale of Goods Act 1957 - Whether applicable - Whether preconditions to application of s. 16 satisfied - Whether breach of conditions shown - Cause of accident - Whether machine defective.

The plaintiff claimed against the defendant the balance of the sum due and owing to the plaintiff under a contract for the sale of a Skyrak Hoist (the said machine). The said machine was installed at the defendant's worksite. In 1979 an accident occured when the said machine crashed to the ground while transporting two workmen to the 21st. floor of the building under construction, causing the death of one workman with the other suffering serious injuries.

The defendant alleged that the plaintiff was in breach of the conditions implied under ss. 15 & 16 of the Sale of Goods Act 1957 (the Act), of description, fitness for the purpose and merchantability of the said machine. The defendant counterclaimed for damages for breach of contract and for a declaration that they are liable to an indemnity against the plaintiff for all sums they are found liable to pay to the estate of the deceased workman and to the injured workman.

The question that arose for determination was whether the plaintiff had been in breach of conditions on description, fitness for purpose and merchantability implied under ss. 15 & 16 of the Act.

Held:

[1] Section 16(1)(a) of the Act lays down four preconditions for its operation namely, the buyer must make known to the seller the particular purpose for which the goods are required, there must be shown reliance by the buyer on the sellers skill and judgment and the buyer must in fact rely on the seller to supply suitable goods, the goods must be of a description which it is in the course of the seller's business to supply, if the goods are specific, they must not be sold under their patent or trade name.

[2] In the present case the defendant bought the machine for use at the construction site. The machine had only one purpose, vertical transportation of men and materials at worksite and the particular purpose for which the machine was intended could be implied.

[3] In spite of the plaintiff's contention that there was no evidence to show that there was reliance by the defendant on the plaintiff's skill and judgment, reliance may be inferred wherever the seller knows the particular purpose for which the goods are required.

[4] The mere fact that the machine sold had a trade name and the fact that it was described in the contract by its trade name would not exclude the operation of the implied condition.

[5] The fact that accidents occured in Hong Kong and elsewhere did not prove that the said machine in Kuala Lumpur was not fit for its purpose.

[6] It was not known who actually installed the said machine up to the height of 55 meters when the plaintiff had only installed the machine up to a height of 30 meters. Whoever installed the balance of the 25 meters did so without the manual. The accident could also have been caused by improper installation of the machine from the height of 30 meters to the height of 55 meters.

[7] There was no evidence that the said machine did not correspond with the description in the sales contract and the brochure.

[Plaintiff's claim allowed. Defendant's counterclaim dismissed].

Cases referred to:

Grant v. Australian Knitting Mills Ltd. [1936] AC 85 ***(foll)***
Hardwick Game Farm v. SAPP [1969] AC 31 ***(refd)***
Baldry v. Marshall [1925] 2 KB 260 ***(foll)***
Calmenson (Pamper) v. Merchants' Warehousing Co. Ltd. [1921] 125 LTR 129 ***(cit)***
Barnett v. Cohen [1921] 2 KB 461 ***(cit)***
Ryoden (M) Sdn. Bhd. v. San Chong Land Development [1992] 1 CLJ 503 ***(refd)***

Legislation referred to:
Factories & Machinery Act 1967, s. 19(1)
Factories & Machinery (Notification, Certificate of Fitness and Inspection) Regulations 1970, r. 10
Sale of Goods Act 1957, ss. 15 & 16(1)
Sales of Goods Act 1893, s. 14 (UK)

For the plaintiff - L.H. Ng; M/s. Skrine & Co.
For the defendant - S. Radhakrishnan; M/s. Shearn Delamore & Co.

JUDGMENT

Dr. Zakaria M. Yatim J:
The plaintiff's claim against the defendant is for a sum of RM56,084 being the balance of the sum due and owing to the plaintiff under a contract for the sale of one complete set of ACE Skyrak Passenger/Material Hoist Model MK 25 (the said machine). The plaintiff also claims interest at the rate of 1% per month as from June 1979 to the date of full payment and costs.

In its statement of defence, the defendant alleged that the plaintiff was in breach of the conditions on description, fitness for the purpose and merchantability implied under ss. 15 and 16(1) of the Sale of Goods Act 1957. The defendant also counterclaimed against the plaintiff for breaches of contract.

In its counterclaim the defendant said that by reason of the breaches of contract on the part of the plaintiff, the defendant had suffered loss and damage totalling RM750,800 together with interest thereon at 6% per annum from 28 April 1979 to date of realisation and costs. The defendant also asked for a declaration that the plaintiff is liable to indemnify the defendant against all sums which the defendant may be found liable to pay to the estate and/or dependants of the deceased workman and to the injured workman as a result of the incident that occurred on 28 April 1979.

It is not in dispute that the plaintiff and the defendant entered into a contract on 10 August 1978 for the sale of one complete set of the said machine. The sale is not disputed by the defendant. The purchase price and the question of the balance sum outstanding are also not disputed. It is also not in dispute that on 28 April 1979 the said machine was being used to transport two workmen to the 21st storey of the building under construction when it failed to stop at the intended height and subsequently crashed to the ground. As a result one workman sustained severe injuries and died. The other workman sustained severe injuries and was hospitalised.

I shall now consider whether the plaintiff had been in breach of conditions on description, fitness for the purpose and merchantability implied under ss. 15 and 16(1) of the Sale of Goods Act 1957.

With regard to sale by description, Mr. L.H. Ng, Counsel for the plaintiff in his written submission conceded that the sale of the said machine was a sale by description and there was consequently an implied condition that the goods should correspond with the description under s. 15 of the Act.

I agree with Mr. L.H. Ng that there was no evidence in this case that the machine did not correspond with the description in the sales contract and the brochure. In fact DW2, who was employed by the defendant at the material time confirmed that the machine as described in the brochure and sales contract was sold by the plaintiff to the defendant and installed at the defendant's construction site. Mr. Radhakrishnan, Counsel for the defendant stated in his written submission that the defendant was not relying on the breach of implied condition under s. 15 of the Act on the basis of the evidence before the Court.

I shall next deal with the question of the condition on fitness for purpose. Section 16(1)(a) of the Act states as follows:

> 16. (1) Subject to this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
>
> (a) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not) there is an implied condition that the goods shall be reasonably fit for such purpose:
>
> Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

I agree with Mr. L.H. Ng that there are four preconditions laid down in s. 16(1)(a). These preconditions are:

(a) The buyer must make known to the seller the particular purpose for which the goods are required.
(b) There must be shown reliance by the buyer on the seller's skill and judgment; and the buyer must in fact rely on the seller to supply suitable goods.
(c) The goods must be of a description which it is in the course of the seller's business to supply.
(d) If the goods are specific, they must not be sold under their patent or trade name.

Mr. L.H. Ng submitted that the preconditions were not implied. He accordingly submitted that preconditions (a) and (b) had not been satisfied. He contended that the defendant had not shown or even suggested in evidence that the particular purpose for which the machine was required was made known to the plaintiff or that there was reliance by the defendant on the plaintiff's skill and judgment.

Mr. Radhakrishnan submitted that the buyer could either expressly or by implication make known to the seller the particular purpose. He relied on a passage in the speech of Lord Wright in *Grant v. Australian Knitting Mills Ltd.* [1936] AC 85. At p. 148, Lord Wright said as follows:

> The first exception, if its terms are satisfied, entitles the buyer to the benefit of an implied condition that the goods are reasonably fit for the purpose for which the goods are supplied, but only if that purpose is made known to the seller 'so as to show that the buyer relies on the seller's skill or judgment'. It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express: it will usually arise by implication from the circumstances: thus to take a case like that in question, of a purchase from a retailer, the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment: the retailer need know nothing about the process of manufacture: it is immaterial whether he be manufacturer or not: the main inducement to deal with a good retail shop is the expectation that the tradesman will have brought the right goods of a good make: the goods sold must be, as they were in the present case, goods of a description which it is in the course of the seller's business to supply: there is no need to specify in terms the particular purpose for which the buyer requires the goods, which is nonetheless the particular purpose within the meaning of the section, because it is the only purpose for which any one would ordinarily want the goods.

I agree with the passage quoted above. In my view the particular purpose for which the goods were required, may be implied.

In the present case the defendant bought the said goods for use at the construction site. I agree with Mr. Radhakrishnan that the machine had only one purpose and that is vertical transportation of men and materials at worksite. Indeed, PW2, the former director of ACE Machinery Limited, in his evidence said, "Purpose of machine designed and built for vertical transportation of men and materials on a construction site. That is the sole purpose of such machine."

With regard to "reliance", it may be inferred. In *Hardwick Games Farm v. SAPP* [1969] AC 31, Lord Pearce at p. 115 said, "...The whole trend of authority has inclined towards an assumption of reliance wherever the seller knows the particular purpose..."

On precondition (d), Mr. L.H. Ng submitted that as the machine in question was sold under its registered trade name, "Skyrak" there was no warranty that the machine would answer the purpose intended by the buyer.

Mr. Radhakrishnan however submitted that the mere fact that the machine sold had a trade name and the fact that it was described in the contract by its trade name would not exclude the operation of the implied condition. In his submission Mr. Radhakrishnan referred to a passage in the judgment of Sargant LJ. In *Baldry v. Marshall* [1925] 2 KB 260, where the object of the provisio to s. 14 of the English Sales of Goods Act 1893 was discussed. At pp. 269 and 270 Sargant LJ said,

> The proviso rather applies to a 'sale of a specified article under its patent or other trade name,' and it seems to me that the sort of mischief it was intended to prevent was this: - It is well known that patent medicines and articles should under trade names are often sold under puffing or laudatory names, which imply that the article will perform a definite function satisfactorily. Suppose a

> hosier were to offer for sale some hose as 'holeproof hose' and a purchaser were to send him an order for holeproof hose, I think it is clear that the purchaser would under ordinary circumstances be relying on the skill and judgment of the vendor to sell him an article which would have the quality implied in its name. But if there is on the market a well-known article known as holeproof hose, then it seems to me that the proviso is aimed at preventing an order of that article under its laudatory name from raising the implication that the buyer is asking the seller to supply him with something which will fulfil the requirements indicated by the name. I do not say that that is the only purpose of the proviso, but I think it is the main purpose.

I agree with Mr. Radhakrishnan's submission in the light of the passage quoted above.

Mr. L.H. Ng submitted that even if the Court were to hold that the defendant had complied with the preconditions the defendant would still fail on the ground that the defendant had not shown breach i.e. that the machine was not fit for its purpose.

Mr. Radhakrishnan also stated in his submission that in order to succeed in its defence the defendant need only to prove one of the implied terms. He went on to state that the defendant's complaints in essence was the breach of implied conditions on fitness for the purpose and merchantability implied under s. 16(1) of the Act.

Mr. L.H. Ng summarised the evidence relied upon by the defendant to suggest that the machine was not fit for its purpose as follows:

(a) the corner's report on the accident in Hong Kong;
(b) the fact that accidents involving similar machines occurred in other places;
(c) the few instances in which the machine stopped at various levels of the building under construction.

Mr. Radhakrishnan did not dispute the accuracy of the above summary but instead went on to reply to Mr. L.H. Ng's submission which was based on the above points.

Mr. L.H. Ng submitted that the report of the Coroner's inquest was not admissible as evidence on the fitness or otherwise of the machine for its purpose. He cited *Calmenson (Pamper) v. Merchants' Warehousing Co. Ltd.* [1921] 125 LTR. 129 and *Barnett v. Cohen* [1921] 2 KB 461.

Mr. L.H. Ng also said that both the defendant and the plaintiff in the present case were not a part to the proceedings before the Coroner. Mr. Radhakrishnan agreed with Mr. L.H. Ng regarding the law on the admissibility of the coroner's report. In his submission, he said, "With regard to the coroner's report my learned friend contends that it is settled law that the same is not admissible as evidence ... I entirely agree with my learned friend on the law ..." Mr. Radhakrishnan went on to add however that "... evidence given at an inquest may legitimately be used for the purposes of cross-examination of a witness ..." at the present trial.

In the circumstances, the Court finds that the Coroner's report on the accident in Hong Kong is not admissible in the present case.

The question for the Court to determine here is whether the fact that accidents involving similar machines occurred in Hong Kong and other places has shown that the machine in Kuala Lumpur was not fit for its purpose.

Mr. L.H. Ng submitted that the evidence of PW2 and DW4 in relation to the accident in Hong Kong did not in any way support the defendant's contention that the machine was not fit for its purpose. Mr. Radhakrishnan however told the Court that PW2 was not a reliable witness and that his evidence relating to the accident in Hong Kong was heresay.

Mr. L.H. Ng, in his submission stated that "...According to PW2, the accident in Hong Kong occurred because the user there fitted an extra part, known as the "drawbridge" to the machine which continuously collided with the mast of the machine causing excessive stress on certain parts of the machines..." PW2 in his evidence said:

> Q: If you were asked to consent to the fittings of drawbridge, would you have consented?
> A: Definitely not
>
> Q: Mr. Elliot in fact said that you personally examined those machine in Hong Kong and these machines you had examined were fitted with drawbridge?
> A: I did examine a hoist in Hong Kong which was re-erected by the general manager who unfortunately died shortly after that, to enable to show both he and his staff after he carried out drop tests etc. and how to erect and install the hoist. On this

machines, without any question of doubt, did not have a drawbridge fitted.

Q: You are a mechanical and electrical engineer?
A: Yes.

Q: If such a drawbridge was in fact fitted to the machines, what is the effect?
A: If the drawbridge was such that the cage could move with the drawbridge in a lowered position it could strike objects in the hoist way.

Q: What would be the effect if that happens?
A: This would cause excessive stress on the hoist cage.

Q: Were these excessive stress have any effect on the bracket?
A: Yes, it could. As I said earlier being part of the hoist stresses will be imposed.

Mr. Elliot, DW4 in his evidence said, "The drawbridge could have contributed to the accident."

DW4 conceded that the machine in Hong Kong was not fitted with a modified bracket as recommended by the manufacturers. In any event DW4 did not appear to be a person qualified to comment on the fitness of the machine for its purpose. This was admitted by him under cross-examination.

Q: You are not an electrical or mechanical engineer, you are qualified as a construction manager and you were an apprentice carpenter. Strictly, you are not qualified to comment on the machine?
A: Technically or professionally, no.

I agree with Mr. L.H. Ng that it is not possible to determine the cause of the accident in Hong Kong from the evidence of PW2 and PW3.

I find that the fact that accidents occurred in Hong Kong and elsewhere does not prove that the machine in Kuala Lumpur was not fit for its purpose. In Hong Kong the drawbridge could have contributed to the accident. There is no evidence to suggest that the "drawbridge" was the cause of the accident in Kuala Lumpur. I also find that PW2 is a reliable witness.

I shall now consider the instances when the machine stopped at different levels of the building under construction.

DW2 gave two instances when the machine stopped at the sixth floor and the ninth floor respectively. Both instances occurred in November 1978. In examination-in-chief, DW2 said as follows:

Q: After it was installed in October, November 1978, did this pinion hoist perform satisfactorily?
A: No, there was some breakdowns, in between there were some breakdowns and we need to call in Union Alloy for repair.

Q: So it doesn't perform satisfactorily and what did you do?
A: Everytime if there is a breakdown I will call up Union Alloy then they will sent their mechanic or their representative to come to the site and attend to the problem. Then after that they will repair then only they inform us it is okay then we start using. From my record there was one instance on 8 November. there was a jam at the 6th floor where the operator informed me then I called Union Alloy and they came to attend to the defects. After they have attended they informed us then only we use again. On 8th when it break down then we informed them they will get it repaired on 9th. There was another incident on 27 November 1978, again jammed at the 9th floor and the same thing after my operator informed me I called up Union Alloy again and they sent their people who came and repaired it and it was ready on 27 November 1978. Then only we use again but there are few instances that I didn't record but I remember there are another one or two times in between.

In cross examination he said that after the machine was repaired by the plaintiff, it was in use by the defendant at the construction site for the purpose of transporting workers and light materials up and down until the date of the accident. His evidence is as follows:

Q: Now, in your statement you referred to a few instances where the machine did not function. Each time the machine did not function you called some representative from Union Alloy who repaired it and you use it again?
A: Yes.

Q: Each time there was a fault it was repaired and it was used again; is that correct?
A: Yes.

Q: So between the period of November 1978 when the machine was first installed right up to the time when the accident happened, the machine was in use?
A: Yes.

Q: Except for a few instances where some repair were needed?
A: Yes.

Q: What is the purpose of this machine?
A: This machine is to carry workers up to the upper floor to attend the work.

Q: To carry workers as well as goods, materials up and down?
A: Materials only very light materials because we have steel hoist for materials.

Q: For that period of time November 1978 right up to the date of accident that machine was used for that purpose?
A: Yes.

From the evidence of PW2 the machine was jammed on two occasions, but it was repaired by the plaintiff and was used again by the defendant.

From the evidence, I find that there is nothing to suggest that the machine was not fit for its purpose.

The defence contended that at the material time there was no British standard in relation to the said machine.

In cross-examination DW2 said,

Question: This standard BS465.69 was used in 1978 and this standard used to cover pinnion hoise.

Answer: I agree.

Question: I put it to you in 1978 there was no such standard for pinnion hoise.
Answer: Yes. The standard deals with principle whether it be the suspension - principle is the same.

Question: This test BS4465/69 was applied in 1978.
Answer: Yes.

Question: After 1978 BS standard specification was introduced to cover pinnion hoist and the 1969 standard was repealed. See BS4465: 1986.
Answer: The Standard BS4465 was amended in 1986. It was merely updated in 1986. (BS4465/1969 produced and marker D5. BS4465: 1986 produced and marked D6.).

Mr. Radhakrishnan submitted that D5 did not cover pinnion hoists. He said that the standard covering pinnion hoists was only published in 1986. (i.e. D6).

According to PW2 the British standard in 1978 was in draft form and the said machine complied with it. In re-examination, PW2 said,

> The requirements for British Standard for rack and pinnion were known in draft at that time and machine complied with it.

Mr. L.H. Ng submitted that British standards are not enforceable whether in draft or in completed form. He said that the British Standards Institute does not have enforcing powers. According to Mr. L.H. Ng, the British Standards merely serve as a guide to British manufacturers and as some kind of "stamp" or "mark" of quality.

I respectfully agree with Mr. L.H. Ng's submission. In any event PW2 has testified that the said machine complied with the relevant standards in draft form at the material time.

Since there is no evidence to show that the machine was not fit for its purpose, what then was the cause of the accident on 28 April 1979.

In his report (P1), the Machinery Inspector (PW1) said,

> The normal stopping device had failed to stop the hoist cage at the 21st floor. When the cage descended both the emergency hand release and the speed governor had failed to function as designed.
>
> These conditions are the direct result of lack of routine maintenance. It is good engineering practice and a well known fact that such machinery require regular maintenance which the owner had failed to provide.

PW1 confirmed his report above in his evidence given in this Court. He said that the maintenance of the machine should have been carried out by the defendant.

Mr. Radhakrishnan in his submission said that PW1 was not a reliable witness.

With respect I think PW1 is a reliable witness and I accept his evidence and his report.

Mr. L.H. Ng contended that the plaintiff installed the machine up to a height of 30 meters but the accident occurred at the 21st floor at a height of approximately 55 metres. He said that the balance of the parts necessary for installation of the balance of the height were delivered by the plaintiff to the defendant on 14 February 1979.

Mr. Radhakrishnan submitted that there was no justification for Mr. L.H. Ng's contention as the plaintiff's own document speaks for itself. He then referred to a letter written by the plaintiff to the defendant dated 5 December 1978. The letter states as follows:

> Syarikat Pembenaan Yeoh Tiong Lay Sdn. Bhd.,
> Site Office,
> Lorong Parry,
> Kuala Lumpur.
>
> Dear Sir,
>
> Re: Skyrak Passenger & Material Hoist Model MK25 (20 persons).
>
> We shall be much obliged if you could kindly certify below that the above equipment now in operation at the 21st Storey, Lorong Parry Site has undergone service, maintenance and repair by our Mr. Victor Yee and technicians thereafter, installation and commissioning.
>
> Thank you.
>
> Yours faithfully,
> UNION ALLOY (M) SDN. BHD.,
>
> Sgd/- SOO PENG KONG
> General Manager.
>
> CERTIFIED BY: ...
> SYARIKAT PEMBENAAN YEOH TIONG LAY SDN. BHD.
> SITE REPRESENTATIVE.

In my view, irrespective of what the above letter states, it is not known who actually installed the machine up to the height of 55 meters. Mr. L.H. Ng rightly submitted, whoever installed the balance of the 25 meters did so without the manual. The defendant did not appear to have the manual at the material time. In his evidence, PW2, said,

> To install machine one would require the manual. It will be unsafe and unsatisfactory to install machine without manual. The tower or the mast - to install and to extend the tower or mast one would require the manual. It's possible to install without manual but very very dangerous procedure.

In my opinion the accident could also have been caused by improper installation of the machine from the height of 30 metres to the height of 55 metres.

PW1 also said in his report that his Department was not advised by the defendant on the installation of the machine. In P1 he stated:

> The owner had also failed to advise the Factories and Machinery Department of the existence of this machine. Otherwise, the unfortunate death of the person and the injury suffered by another could have been prevented.

In his evidence, PW1 said:

> When they installed the machine after they have installed machine with the approval of F & M Department the owner or his agent will then advice F & M Department and the director will direct an inspector to carry out inspection and necessary test to ensure that machine is fit for operations. For all machines the inspector inspect all the safety features in the machine built by the manufacturer. On machine of this type we also carry out load test whereby the machine is loaded with full capacity and the brakes are then tested in the free fall situation.

Mr. L.H. Ng referred to s. 19 of the Factories & Machinery Act 1967 and Regulation 10 of the Factories & Machinery (Notification, Certificate of Fitness and Inspection) Regulations 1970. Section 19(1) of the Act states:

> 19. (1) No person shall operate or cause or permit to be operated any machinery in respect of which a certificate of fitness is prescribed, unless there is in force in relation to the operation of the machinery a valid certificate of fitness issued under this Act.

Regulation 10 states:

> 10(1) The owner of every steam boiler, unfired pressure vessel or hoisting machine other than a hoisting machine driven by manual power shall hold a valid certificate of fitness in respect thereof so long as such machinery remains in service.

It is not disputed that the defendant did not report the use and operation of the machine to the Factories and Machinery Department and no certificate of fitness had been issued. In my view it is the responsibility of the defendant to get the necessary approval from the said Department. *Ryoden (M) Sdn. Bhd. v. San Chong Land Development* [1992] 1 CLJ 503. This, the defendant has failed to do.

For the reasons stated above I give judgment for the plaintiff as prayed in the statement of claim and dismiss the counterclaim.